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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 345

EMANUEL POLLOCK,

Appellant,

vs.

H. T. WILLIAMS, as Sheriff of Brevard County, Florida.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

STATEMENT AS TO JURISDICTION.

R. F. Maguire,
W. H. Pou,
Counsel for Appellant.

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JURISDICTIONAL STATEMENT.

Comes now Emanuel Pollock, petitioner and appellant herein, pursuant to Rule 12 of the Rules of the Supreme Court of the United States, and insupport of his petition for an appeal to the Supreme Court of the United States from the Supreme Court of Florida in the above styled cause, states:

I.

Jurisdiction of this appeal is sustained by Section 237(a) of the Judicial Code of the United States, being Section 344(a) of Title 28, of the United States Code.

II.

The validity of Chapter 7917, Laws of Florida, 1919 (Volume I, page 286), re-enacted as Sections 817.09 and 817.10 of the Revised Statutes of Florida, 1941 (Volume I, pages not numbered), is involved, and the decision and judgment of the Supreme Court of Florida, the highest court of the State of Florida, was in favor of the validity thereof, notwithstanding the contention of the appellant that said statute is repugnant to the Thirteenth and Fourteenth Amendments to the Constitution of the United States, and laws duly enacted thereunder. The said statute is set forth verbatim in paragraph VI hereof.

III.

The decision and judgment in question was made and entered on July 24, 1943, and the application for appeal is presented on the 16th day of August, 1943.

IV.

This case originated in the Circuit Court of Brevard County, Florida, on habeas corpus after the conviction of appellant and his commitment to jail for a term of 60 days.

The point, and the only point, presented and considered by the Circuit Court of Brevard County, Florida, and the Supreme Court of Florida, was whether whether or not the statute aforesaid under which the appellant was convicted and committed was repugnant to applicable provisions of the Constitution and laws of the United States. No State question was raised or decided, or according to the belief of appellant, exists, adequate to sustain the decision and judgment of Supreme Court of Florida, if the said decision and judgment are erroneous on the questions of Federal Law raised by the petition for, and the return to, the writ of habeas corpus. The judgment of the Supreme Court

of Florida was a final and complete judgment in favor of the validity of the said statute, and, unless reversed by the Supreme Court of the United States, nothing remains to be done except to remand the appellant to the custody of the appellee for the execution of the remainder of the sentence aforesaid, and said judgment cannot be reversed, annulled, modified or corrected except upon review by the Supreme Court of the United States.

V.

The appellant relies upon the following cases to sustain the jurisdiction of the Supreme Court of the United States in this cause:

Holmes v. *Jennison*, 14 Peters 540;
Ex. Parte Milligan, 4 Wall. 2;
Bailey v. *Alabama*, 219 U. S. 219.

Appellant relies upon the following cases to show that a substantial Federal question is presented:

Bailey v. *Alabama*, 219 U. S. 219;
Taylor v. *Georgia*, 315 U. S. 25.

VI.

This cause was commenced by petitioner in the Circuit Court of Brevard County, Florida, by a petition for the issuance of a writ of habeas corpus, to be directed to the appellee, H. T. Williams, as Sheriff of Brevard County, Florida, commanding him to produce the body of the petitioner before said court and show the cause of the detention of the petitioner. It was alleged in the petition (R. 1-3) that the appellee, as ex-officio keeper of the jail of said County unlawfully restrained petitioner of his liberty in violation of the Constitution of the United States and laws duly enacted pursuant thereto; that the restraint was under a pretended commitment from the County Judge's Court

in said County, purported to be based upon a judgment of conviction and sentence for a pretended violation of Chapter 7917, Laws of Florida, 1919, now Sections 817.09 and 817.10 of the Florida Statutes, 1941, which statute reads as follows:

> "Section 1. (Sec. 817.09, Fla. Stat. 1941). Obtaining property by fraudulent promise to perform labor or service. Any person in this state who shall, with intent to injure and defraud, under and by reason of a contract or promise to perform labor or service, procure or obtain money or other thing of value as a credit, or as advances, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding six months.
>
> "Section 2. (Sec. 817.10, Fla. Stat. 1941). Same; prima facie evidence of fraudulent intent. In all prosecutions for a violation of sec. 817.09 the failure or refusal, without just cause, to perform such labor or service or to pay for the money or other thing of value so obtained or procured shall be prima facie evidence of the intent to injure and defraud."

The petitioner further alleged that said statute is and was repugant to the 13th and 14th Amendments to the Constitution of the United States, and Acts of Congress, particularly Section 56, Title 8, of the United States Code, duly enacted pursuant to said Amendments, and is void and of no effect, by reason whereof the County Judge's Court was without jurisdiction of the cause, and that the warrant charged no offense against the laws of the State of Florida, the judgment, sentence and commitment were void, and the imprisonment of defendant was illegal, and in violation of petitioner's right under the Constitution and laws of the United States.

The petition further alleged that at said trial petitioner did not know, and was not advised, of his right to counsel,

and was without funds and unable to employ counsel; that he did not understand the nature of the charge against him, but understood that if he owed any money to his prior employer and had quit his employment without paying the same, he was guilty, which facts he admitted; that thereupon a plea of guilty was entered of record, and judgment and sentence was thereupon pronounced upon him, all in violation of his rights under the Constitution and laws of the United States and the State of Florida. A copy of the warrant, plea and judgment was attached and made a part of the petition. The charging part of said warrant, which was dated January 2, 1943, was as follows:

> "C. W. Bates has this day made oath before me that on the 17th day of October, A. D. 1942, in this county aforesaid, one Mann Pollock did then and there, with intent to injure and defraud under and by reason of a contract and promise to perform labor and service, procure and obtain money, to-wit: the sum of $5.00, as advance from one J. V. D'Albora, a corporation" (R. 4).

The exhibits to said petition further showed that said warrant was executed on January 5, 1943, by taking petitioner into custody (R. 5), and that he was tried and pleaded guilty on the same day, whereupon the following judgment was entered by the County Judge of said county:

> "It is considered, ordered and adjudged that the defendant is guilty as charged in the affidavit. Further ordered that said defendant do pay a fine of $100.00 to include costs of this case, and that in default of payment thereof he serve a period of 60 days in the County jail of Brevard County, Florida (R. 6).

The said record further shows that a commitment issued on said judgment on the same day. (R. 6).

The said Circuit Court, on January 11, 1943, issued a writ of habeas corpus (R. 7), addressed to the appellee,

requiring him to make due return to the writ on the same day, and if the petitioner was in his custody or control, to produce his body together with the cause of his detention and show cause why he should not be discharged therefrom. At said time, the appellee produced the petitioner, and gave as the cause of the detention and restraint the commitment from the County Judge's Court based upon the judgment and conviction as set forth in the petition. The return did not deny any of the allegations of fact in said petition (R. 8).

The Circuit Court, after hearing, adjudged the statute upon which the warrant, judgment and conviction was founded to be unconstitutional and void and the imprisonment illegal, and thereupon discharged the petitioner from the custody of the appellee (R. 9).

And appeal from said judgment was duly perfected to the Supreme Court of Florida by appellee (R. 10, 11), and on July 24, 1943, the Court pronounced its opinion and final judgment in said cause, and reversed the judgment of the Circuit Court aforesaid, holding that the imprisonment of the petitioner was lawful and consistent with the Constitution of the United States. The substance of the holding of the court was that the first section of the aforesaid statute of Florida was not in violation of the 13th Amendment to the Constitution of the United States, in cases where the second section was not brought into play by the introduction of testimony and use of the presumption of intent created by the second section, e.g., when the conviction is based upon a plea of guilty. The court did not discuss the alleged violation of the equal protection clause of the 14th Amendment to the Constitution of the United States, but the judgment necessarily overruled the claim of the petitioner grounded upon said clause.

By the aforesaid final judgment the Supreme Court of Florida has directed the Circuit Court of Brevard County, Florida, to vacate its judgment aforesaid, and to remand

the petitioner to the custody of the appellee for the execution of the sentence of the County Judge of said County.

That the Supreme Court of Florida is the highest court of the State of Florida in which a decision of this suit can be had.

That in said suit there is drawn in question the validity of a statute of the State of Florida on the ground that said statute is repugnant to the Constitution and laws of the United States, and the decision is in favor of its validity, notwithstanding your petitioner's contention that said statute violates the Thirteenth and Fourteenth Amendments to the Constitution of the United States and laws duly enacted in pursuance thereof.

VII.

The opinion of the Supreme Court of Florida in said cause, and being the only opinion therein is, omitting caption, as follows:

Opinion.

Thomas, J.:

The appellee pleaded guilty of violating Section 817.09 Florida Statutes, 1941, and was held under a commitment when discharged upon a writ of habeas corpus by the circuit judge who had the conviction that the act offended the Constitution of the United States, presumably the Thirteenth Amendment prohibiting involuntary servitude. The act denounces as a misdemeanant "any person * * * who * * *, with intent to injure and defraud, under and by reason of a contract or promise to perform labor or service [procures] * * * money or other thing of value as a credit, or as advances * * *."

Better to present our observations on the matter involved we will give also the substance of a related statute, Sec-

tion 817.10 Florida Statutes, 1941, declaring that the "failure or refusal, without just cause, to perform such labor or service or to pay for the money or other thing of value so obtained • • • shall be prima facie evidence of the intent to injure and defraud."

The former was Section 1, the latter Section 2, of Chapter 7917, Laws of Florida, Acts of 1919.

This is not the first challenge of the act which has appeared in this Court. The identical matter was considered in *Phillips* v. *Bell*, 84 Fla. 225, 94 So. 699, where the court concluded that the portion of the law defining the crime was harmonious with the Thirteenth Amendment and observed, without deciding the point, that if the part referring to the prima facie character of certain evidence should be pronounced unconstitutional the ruling would not affect the remainder. The discussion was largely devoted to the applicability of the decisions of the Supreme Court of the United States in *Bailey* v. *State of Alabama*, 211 U. S. 452, 29 Sup. Ct. Rep. 141, 53 L. Ed. 278, and in another case of the same title reported in 219 U. S. 219, 31 Sup. Ct. Rep. 145, 55 L. Ed. 191, to the proposition under study.

We are inclined to adhere to our former decision, but we recognize our duty to defer to the decisions of the Supreme Court of the United States where the interpretation of the Federal Constitution is involved. Bearing in mind this obligation we will examine, in their order, the first and second cases of *Bailey* v. *Alabama* and *Phillips* v. *Bell*, *supra*, then determine the effect upon them of a recent opinion of the Supreme Court of the United States, *Ira Taylor* v. *State of Georgia*, *infra*.

In the first there was entertained a petition for habeas corpus in which the constitutionality of a law making it an offense "to enter into a contract • • • for service with intent to • • • defraud the employer, and, after thereby obtaining money • • • from such employer,

• • • and without refunding the money or paying for the property, to refuse to perform the service." An amendment made the "refusal or failure to perform without just cause prima facie evidence of the intent." The court considered these two features, one denouncing a fraudulent act and one providing a method of proof, together with a rule in Alabama preventing a person from testifying as to his motive. No testimony had been taken in the case and the question was the unconstitutionality of the act and the amendment on their face without regard to the practical application of the amendment and the local rule dealing with proof. This is apparent from the comment of the court: "When the case comes to trial it may be that the prosecution will not rely upon the statutory presumption, but will exhibit satisfactory proof of a fraudulent scheme, so that the validity of the addition to the statute will not come into question at all."

We think it very significant that the court remarked upon the lack of doubt that the offense defined could be made a crime. Gist of the decision, as we understand it was, summarizing, that the part of the law describing crime and the one providing for the presumption were not interdependent and that if, in the prosecution, the State did not resort to the latter the validity of the former would be unaffected.

The petitioner was remanded, tried and found guilty. The Supreme Court of Alabama affirmed the judgment and again the Supreme Court of the United States reviewed the case. It then appeared that the conviction of the defendant was obtained because of the operation of the amendment providing that refusal of the employee to perform was *prima facie* evidence of intent to defraud the employer. In their analysis the court stressed the possibility of conviction for crime simply because of a breach of contract and failure to discharge a debt. By such flimsy testimony could

the presumption of innocense be overcome. This was particularly true in view of the rule preventing a defendant from swearing that he intended no fraud.

It was the gist of the opinion that the statute designed to punish fraud became an instrument to compel service when the provision for *prima facie* evidence of guilt was brought into play, especially, as will be seen when we discuss *Taylor* v. *Georgia, infra*, when the defendant was prohibted from testifying about his purpose or intention. The court concluded that the Alabama law "in so far as it makes the refusal or failure to perform the act or service, without refunding the money or paying for the property *prima facie* evidence of the commission received [sic] of the crime which the section defines, is in conflict with the 13th Amendment, * * * and is therefore invalid."

From a perusal of both opinions the deduction is inevitable that the law denouncing the crime was not held in conflict with the Constitution until made so by invoking in a given case the rule with reference to *prima facie* evidence and that, standing alone, it was not invalid.

We reach now, in its turn, our own decision in *Phillips* v. *Bell, supra*, where the chief justice expressed the opinion, concurred in by the other members of the court, that the section of the Florida Statutes defining the offenses was not inharmonious with the Constitution of the United States. One feature of that controversy was common to the first *Bailey* case, no testimony appeared in the record and so there was no need to determine whether the second section, with regard to *prima facie* evidence, was invalid or whether the first could be invalidated by it. Incidentally, that characteristic is present in the instant case for, as we stated at the outset, the plea was guilty, hence no evidence was taken.

This Court drew attention to certain "material differences" between the first portions of the Alabama and Florida Statutes defining the crime and to the similarity of the

parts establishing the *prima facie* evidence rule, but the rationale of the case and of both decisions of the United States Supreme Court to which we have alluded was, we believe, the declaration of the validity of the first section of the act when not infected by employment of the second.

The question now is the effect upon these decisions of the one rendered by the Supreme Court of the United States in, *Ira Taylor* v. *State of Georgia*, 315 U. S. 25, 62 Sup. Ct. Rep. 415, 86 Law Ed. 615. Mr. Justice Byrnes by way of introduction stated that the "Appellant was indicted * * * for violation of [sections] 7408 and 7409, of Title 26 of the Georgia Code." Although the former defined as crime contracting to perform services "with intent to procure money * * *" and not to perform * * * to the loss and damage of the hirer; or after having so contracted, * * * [procuring] from the hirer money, * * * with intent not to perform such service, * * *" the latter provided that "Satisfactory proof of the contract," the procurement of the money, the failure to perform or failure to return the money and loss or damage to the hirer, should be "deemed presumptive evidence of the intent referred to in the preceding section."

Clearly he could not have been indicted for violation of the latter section and while we do not wish to appear hypercritical we draw attention to the phraseology because of the frequent use of the plural in the opinion. It is stated that appellant asserted by way of demurrer to the indictment that sections 7408 and 7409 "were repugnant * * * to the Thirteenth Amendment." After trial upon the evidence had resulted in a conviction a new trial was sought upon this ground and others.

The court held that "There was no material distinction between the Georgia statutes challenged there and the Alabama statute which was held to violate the Thirteenth Amendment in *Bailey* v. *Alabama*, * * *" (the second

case). The court disposed of the argument—it was the same as the one presented in the second *Bailey* case—that one section dealt with punishment of fraud and the other a rule of evidence, by announcing that the latter "actually * * * embodies a substantive prohibition which squarely contravenes the Thirteenth Amendment * * *." The conclusion was "that sections of the Georgia Code upon which this conviction rests are repugnant to the Thirteenth Amendment * * *." It will be noted that there is no qualification such as appeared in the latter *Bailey* case where, to repeat, the Alabama Statute was declared invalid "*so far as it* [made] * * * *failure to perform* * * * without refunding the money * * * *prima facie evidence*" of guilt. (Italics supplied by us.)

In view of the unqualified declaration that both were unconstitutional our first impression was that we would recede from the construction we had announced in *Philips* v. *Bell*, *supra*. This was emphasized because of the resemblance of the Georgia Statute to ours and the finding that no essential distinction existed between the former and the law of Alabama. Thus the axiom "two things equal to the same thing are equal to each other" seemed not inappropriate and the Florida act would fall with that of Georgia, despite our view in *Phillips* v. *Bell* that "there [were] material differences between the Alabama statutes * * * and the Florida statute."

Upon reflection it seems, however, that it was not the aim of the court to revise in the Taylor decision what had been announced in the second *Bailey* case.

Plainly, in both, testimony had been introduced to establish those elements necessary to raise the presumption under the statute and it was especially found that without the aid of it conviction could not have resulted. It is mani-

fest, too, as in the later *Bailey* case, that the court was called upon to construe together the two sections and to determine the effect of one upon the other and of both upon the rights of the appellant. In these circumstances we are not convinced that the Supreme Court of the United States intended to declare both sections unconstitutional regardless of any state of facts that might be presented. In our zeal to follow the decisions of that high tribunal we cannot but believe that the decision in the *Taylor* case was confined to a situation there present. The section anent presumptive evidence had been relied upon to secure a conviction so that the court again had for determination the question of the constitutionality of the first section when the second was brought into play. Not being faced with that problem here we conclude that the first *Bailey* decision and ours in *Phillips* v. *Bell* are in accord and that they in turn are not in conflict with the rulings in the second *Bailey* case and *Taylor* v. *State of Georgia, supra.*

Reversed.

Buford, C. J. Terrell, Brown, Chapman, Adams and Sebring, J. J. Concur.

VIII.

Although the Supreme Court of Florida did not, in its opinion, refer to the contentions of appellant that the statute was repugnant to the 14th Amendment and Section 56 of Title 8, United States Code, those contentions were made in the petition for the writ of habeas corpus, were argued in the brief and orally, and were, in effect, overruled by the judgment of reversal.

WHEREFORE, appellant believes that the Supreme Court of the United States has jurisdiction of this appeal, that the

appeal ought to be allowed, and that the decision and judgment of the Supreme Court of Florida ought to be reviewed and reversed.

Respectfully submitted,

R. F. Maguire,
W. H. Poe,
Attorneys for Appellant.

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